

KEVIN M. RUSSELL
Claimant

**H & K DELIVERY;
MERCHANTS HOME DELIVERY; and
LEVITZ FURNITURE CORPORATION**

AND

**CRAWFORD & COMPANY and
TRAVELERS PROPERTY CASUALTY**
Insurance Carriers

- (1) The claimant, Kevin M. Russell, twisted and injured his knee on July 12, 1994, when he stepped from his delivery truck.
- (2) Although he received surgery on his knee in both July and December 1994, because his symptoms are not resolving as his surgeon indicated they would, Mr. Russell desires to return to his surgeon for additional medical treatment.

(3) At the time of the accident, Mr. Russell was delivering furniture that had been purchased at Levitz Furniture Corporation. Levitz had contracted with Merchants Home Delivery to handle its furniture deliveries. Merchants is a nationwide furniture delivery service.

(4) In July 1993 Merchants contracted with Mr. Russell for delivery services. In conjunction with that contract, Mr. Russell did business as H & K Delivery. Since its inception, Mr. Russell has only delivered furniture for Levitz.

(5) Mr. Russell is required to report to Levitz every workday between 6:30 and 7 a.m. Once at the Levitz warehouse, Mr. Russell is assigned one of three routes. He then loads his truck, telephones customers, and begins his daily deliveries.

(6) Under the contract with Merchants, Mr. Russell is required to provide his own delivery trucks. He is, however, required to place both the Levitz and Merchants logos on the trucks. Merchants restricts Mr. Russell from using the truck for any purpose other than delivery for Levitz.

(7) Merchants maintains control over whom Mr. Russell can hire and retains the right to require Mr. Russell and any drivers that he hires to undergo random drug screening.

(8) Every two weeks Merchants pays Mr. Russell a percentage of the delivery charges for the furniture he has delivered. No taxes are withheld from those receipts. Mr. Russell must pay his own expenses, including maintenance and lease payments on the trucks.

(9) When beginning the working arrangement with Merchants, Mr. Russell signed a contract entitled Independent Truckman's Agreement. That agreement provides, among other things, that Mr. Russell is to provide his own workers compensation insurance and that the parties intended that Mr. Russell would be an independent contractor rather than an employee.

(10) The record also contains a copy of the contract between Levitz and Merchants. That contract specifies that Levitz will route all furniture deliveries according to a delivery schedule. The contract also states that any delivery vehicles which displays Levitz's name or logos shall not be used for any purpose other than Levitz's deliveries absent its consent.

(11) Should Mr. Russell be entitled to receive workers compensation benefits from either Levitz or Merchants, Merchants stipulates that the award should be entered against it.

CONCLUSIONS OF LAW

(1) The Workers Compensation Act is to be liberally construed to bring employers and employees within its provisions and protections. K.S.A. 44-501(g).

(2) The preliminary hearing finding on whether Mr. Russell is an independent contractor or an employee of either Levitz or Merchants for purposes of the Workers Compensation Act is subject to Appeals Board review. The question whether a worker is an employee is encompassed in two of the jurisdictional issues specifically listed in K.S.A. 1997 Supp. 44-534a as reviewable:

(1) Did the employee sustain an accidental injury?

(2) Did the injury arise out of and in the course of the employee's employment?

(3) Generally, an independent contractor is someone who contracts to perform a piece of work according to his own methods and without being subject to control of an employer, except as to final result. A master, however, is someone who employs another to perform services in his affairs and who controls or has the right to control the conduct of the other in performing those services. It is the right to control, not the actual exercise of that right that is important.¹

(4) In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are (1) the existence of a contract to perform a certain piece or kind of work at a fixed price, (2) the independent nature of the worker's business or distinct calling, (3) the employment of assistants with the right to supervise their activities, (4) the worker's obligation to furnish necessary tools, supplies, and materials, (5) the worker's right to control the progress of the work, (6) the length of time for which the worker is employed, (7) whether the worker is paid by time or by job, and (8) whether the work is part of the regular business of the employer.²

(5) The relationship of contracting parties depends on all the facts and the label that they choose to employ is only one of those facts. The terminology used by the parties is

¹Wallis v. Secretary of Kans. Dept. of Human Resources, 236 Kan. 97, 689 P.2d 787 (1984); and Evans v. Board of Education of Hays, 178 Kan. 275, 284 P.2d 1068 (1955).

²McCubbin v. Walker, 256 Kan. 276, 886 P.2d 790 (1994)

not binding when determining whether an individual is an employee or an independent contractor.³

(6) Mr. Russell did not perform any work for anyone other than Levitz. Mr. Russell did not offer his services to the general public or other businesses. Levitz controlled the time Mr. Russell reported to work, what he wore, the number of deliveries he would make each day, the use of his trucks, and to a certain extent the time he would finish his workday. Because of that control, coupled with the fact that Mr. Russell only delivered furniture for Levitz in an ongoing relationship, Mr. Russell's relationship with Levitz was more in the nature of employer-employee rather than that of an independent contractor for purposes of the Workers Compensation Act.

(7) Pursuant to the stipulation between Levitz and Merchants, the latter is responsible for the workers compensation benefits due Mr. Russell in this proceeding.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the preliminary hearing Order dated June 5, 1998, entered by Administrative Law Judge Robert H. Foerschler denying claimant workers compensation benefits on the basis that he was an independent contractor should be, and hereby is, reversed; that the claimant was an employee of Levitz Furniture Corporation on the date of accident and Merchants Home Delivery is responsible for any workers compensation benefits due Mr. Russell as a result of his July 12, 1994 accident.

IT IS SO ORDERED.

Dated this ____ day of July 1998.

BOARD MEMBER

c: Kathryn P. Barnett, Kansas City, KS
Bryce Moore, Overland Park, KS
William G. Belden, Overland Park, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director

³Knoble v. National Carriers, Inc., 212 Kan. 331, 510 P.2d 1274 (1973).